United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2112, 74-2197

To be argued by
RONALD L. GARNETT

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 74-2112, 74-2197

UNITED STATES OF AMERICA,
Appellee,

—v.—

MITCHELL REIN AND SELIG SPIRN,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

RONALD L. GARNETT,
JOHN D. GORDAN, III,
Assistant United States Attorneys, of Counsel.

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Preliminary Statement

Mitchell Rein and Selig Spirn appeal from judgments of conviction entered on July 26, 1974, in the United States District Court for the Southern District of New York, after a two-day non-jury trial before the Honorable Harold R. Tyler, Jr., United States District Judge.

Information 74 Cr. 608, filed June 17, 1974, and superseding Indictment 73 Cr. 990, charged Rein and Spirn with committing acts of juvenile delinquency by assaulting a foreign official in violation of Title 18, United States Code, Sections 112(a) and 2, and Title 18, United States Code, Section 5032.

Trial commenced before Judge Tyler on June 17, 1974. At the end of that day, Rein was found guilty of juvenile delinquency as charged in the Information. On June 18,

1974, Spirn was also convicted of the charge in the Information.

On July 26, 1974, Rein and Spirn were each sentenced by Judge Tyler to probation for a term not to exceed his minority.

Statement of Facts

The Government's Case

On the night of March 15, 1973, at approximately 9:00 P.M. German Kosenkov, Second Secretary of the Russian Mission to the United Nations, left the Russian Embassy at 137 East 67th Street, New York City, and proceeded to walk north along the west side of Third Avenue toward his home at 257 East 87th Street.* Between 69th and 70th Streets he heard someone running up behind him. He stopped, turned around, and saw two young men who were breathing heavily (27-29).** This observation lasted three or four seconds (46). These two men continued to follow behind him at a distance of two to three feet. When he approached the crossing at 72nd Street and Third Avenue, the traffic light turned red and he stopped. At that moment a red liquid *** was thrown upon his face and raincoat from both sides (29-30, 48; GX 1). Kosenkov at once turned around and saw the face of one of the young men from one to three seconds before the young man turned and ran away (47-48). Kosenkov testified he was nervous and upset, but that he felt no fear (50). Kosenkov identified Rein in court as one of his assailants but was unable to make an in-court identification of Spirn (33).

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* At page 28 of the trial record it is incorrectly stated that Kosenkov's address is on E. 67th Street.

** Numerical references are to the page numbers of the trial transcript.

*** This substance was later determined to be beef blood (31).

Detective David Greenberg of the New York City Police Department, then off duty and riding in a taxicab with other persons at the time of the assault upon Kosenkov, observed on a corner a man falling, covered with what seemed to be blood, and two men near him who began to run away. It appeared to him that a crime had been committed and he, therefore, instructed the cab driver to follow the two men. The two men subsequently stopped to hail a cab, but turned to run when the cab that stopped was the cab containing the detective (69-70). The suspects were ordered to stop, did so, and were placed under arrest and taken to the local precinct located on East 67th Street, directly across from the Russian Embassy (74). Greenberg positively identified Spirn in court as one of the men he had arrested that night but was unable to make an in-court identification of Rein (77).

Kosenkov shortly thereafter appeared at the precinct to report the incident. He was told by a police officer to go near a second room inside the precinct, where Kosenkov expected that the interview was to be continued (36, 53). He saw and recognized inside the room the two men who had assaulted him and started to point to them, speaking in his native tongue. He told the interpreter and the police that those were the two men who had assaulted him (36, 42, 75). The two men in the room were those whom Greenberg had just arrested and had identified themselves as Mitchell Rein and Selig Spirn to the police officer who interviewed them at the precinct (74-75, 96-98).

Defense Case

Rein offered no evidence.

Spirn recalled Detective Greenberg in an attempt to impeach his in-court identification of Spirn.

ARGUMENT

POINT I

Judge Tyler properly allowed the in-court identification of Rein by Kosenkov.

Rein complains that Kosenkov should not have been allowed to make an in-court identification of Rein, claiming that the confrontation in the station house on the night of the crime was "'unnecessarily suggestive and conductive [sic] to mistaken identification'" (Brief at 7) and therefore tainted the in-court identification. The contention is without merit.

Rein apparently concedes, as he must, *Kirby* v. *Illinois,* 406 U.S. 682 (1972), that the confrontation in this case, occurring before the initiation of adversary judicial proceedings, is governed not by the strict Sixth Amendment standard of *United States* v. *Wade,* 388 U.S. 218 (1967), but rather by the due process standard articulated in *Stovall* v. *Denno,* 388 U.S. 293 (1967). The inquiry is whether the confrontation was "unnecessarily suggestive and conducive to irreparable mistaken identification". *Kirby* v. *Illinois, supra,* 406 U.S. at 961. Here, after hearing all of the evidence at trial, Judge Tyler refused to exclude the in-court identification, holding that Kosenkov had had a sufficient opportunity to form a fixed mental image of Rein from the observations he had made just before and at the time of the assault, that the identification at the precinct was not impermissibly suggestive, and that even if it had been, the totality of the circumstances—including Kosenkov's ability to pick out Rein in court, despite the presence of others resembling and dressed like Rein, and Kosenkov's refusal to identify Spirn in court as his other assailant—established that Kosenkov's in-court identification of Rein had not been tainted (113-115). Judge Tyler's findings are, of course, entitled to great weight. *United States ex rel. John* v. *Cassales,* 489 F.2d 20, 25 (2d Cir. 1973); *United States ex rel. Phipps* v. *Follette,* 428 F.2d 912, 915 (2d Cir.), *cert. denied,* 400 U.S. 908 (1970). The Judge's conclusion was clearly correct.

First, Judge Tyler quite properly concluded that the identification technique used here was not impermissibly suggestive. A prompt confrontation between a recent victim and those believed to be his assailants is not forbidden by *Wade* as impermissibly suggestive; rather, it is a proper police practice. *United States ex rel. Anderson* v. *Mancusi,* 413 F.2d 1012 (2d Cir. 1969); *United States* v. *Sanchez,* 422 F.2d 1198, 1200 (2d Cir. 1970); *United States ex rel. Frizer* v. *McMann,* 437 F.2d 1309 (2d Cir. 1970), *cert. denied,* 402 U.S. 1010 (1971); *United States ex rel. Cummings* v. *Zelker,* 455 F.2d 714, 716 (2d Cir.), *cert. denied,* 406 U.S. 927 (1972). See also *Stanley* v. *Cox,* 486 F.2d 48, 50-51 (4th Cir. 1973); *Bates* v. *United States,* 405 F.2d 1104, 1106 (D.C. Cir. 1968) (Burger, *J.*). Here, as in the cases cited, the confrontation was soon after the crime. The assault took place at about 9:00 P.M., and Kosenkov, after changing his clothes at the Embassy across the street from the precinct, went to the precinct, where by 10:15 P.M. the defendants had already arrived (95). Moreover, in the cases cited the witness knew that he was being shown an individual in custody whom the police believed to be the perpetrator of the crime. Here, to the contrary, Kosenkov went to the precinct to report the incident, not to make an identification of supects. Indeed, the record is bereft of any suggestion that, until the moment of recognition, Kosenkov had any idea that his assailants had been apprehended. Similarly, when Kosenkov was directed to the room where he saw and identified Rein and Spirn, he had no idea that he was being given an opportunity to identify suspects in the crime against him; rather, he

thought he was going into the room to continue a conversation that had been going on at that time in the hall. *Mock* v. *Rose*, 472 F.2d 619, 621 (6th Cir. 1972), *cert. denied*, 411 U.S. 971 (1973).

Second, even if the confrontation in the precinct house had been impermissibly suggestive, there would be no reason to suppress Kosenkov's in-court identification of Rein. The inquiry for the District Court in such a context would be ". . . whether, before the imprint arising from the unlawful identification procedure, there was already such a definite image in the witness' mind that he is able to rely on it without much, if any, assistance from its successor." *United States ex rel. Phipps* v. *Follette, supra*, 428 F.2d at 915. Kosenkov testified that he had first seen the men who were shortly to be his assailants just minutes before the assault. Hearing running footsteps behind him, Kosenkov, who was walking on Third Avenue at night, turned and looked at the two young men from a distance of about three feet for about five seconds. Minutes later, just after the blood had been poured on him,* Kosenkov also had a further view of the face of at least one of his two assailants for a one or two second period (32, 48). This was clearly, as Judge Tyler found, a sufficient period for Kosenkov to form a clear mental impression of the persons who threw blood on him. *United States* v. *Yanishefsky*, 500 F.2d 1327, 1330 (2d Cir. 1974). See also *United States ex rel. Robinson* v. *Zelker*, 468 F.2d 159 (2d Cir. 1972), *cert. denied*, 411 U.S. 939 (1973); ** *United States ex rel. Curtis* v. *Warden*, 463 F.2d 84 (2d Cir. 1972). Moreover, there was only a brief lapse of time—less than two hours—between the crime and Kosenkov's positive identification of Rein and Spirn. *United States* v. *Counts*, 471 F.2d 422, 425 (2d Cir.), *cert. denied*, 411 U.S. 935 (1973); *United States ex rel. Bisordi* v. *LaVallee*, 461 F.2d 1020, 1024 (2d Cir. 1972); *United States* v. *Fernandez*, 456 F.2d 638, 642 (2d Cir. 1972); *United States ex rel. Phipps* v. *Follette, supra*, 428 F.2d at 915. Finally, despite the presence of others in the courtroom resembling Rein, and despite the fact that any suggestiveness in the context of an in-court confrontation might have lead to an identification of Spirn which Kosenkov declined to make, Kosenkov, a man of obvious intelligence, as Judge Tyler noted (132-133), was unequivocal in his identification of Rein. *United States ex rel. Gonzalez* v. *Zelker*, 477 F.2d 797, 802 (2d Cir.), *cert. denied*, 414 U.S. 924 (1973). *United States ex rel. Smiley* v. *LaVallee*, 473 F.2d 682 (2d Cir. 1973); *United States ex rel. Bisordi* v. *LaVallee, supra*, 461 F.2d at 1024.

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* Kosenkov testified that the blood had not gotten in his eyes (32).

** *Robinson* appears of particular relevance here. In that case, the identifying witness, a patrolman, had two brief observations of the appellant, one for four seconds, the other for two or three. *Id.* at 164. While these occurred in broad daylight, one was at a distance of some twenty-five feet, *id.* at 164, and the other at some forty feet, *United States ex rel. Robinson* v. *Vincent*, 371 F. Supp. 409, 411-412 (S.D.N.Y.), *aff'd*, 506 F.2d 923 (2d Cir. 1974). Thirty-six hours later, in contrast to the maximum of two here, the patrolman saw Robinson alone at a precinct house and identified him as the perpetrator. 468 F.2d at 162-163.

This Court held, applying the more stringent *Wade* standard, ". . . that there is evidence in the record that would justify a finding either way on the issue of 'independent source' . . .", 468 F.2d at 164, and remanded to the District Court for an evidentiary hearing, where a finding of independent source was made and later affirmed by this Court. *United States ex rel. Robinson* v. *Vincent, supra.*

[Footnote continued on following page]

POINT II

Judge Tyler properly used his discretion in limiting cross-examination of Kosenkov, because the questions posed were irrelevant, objectionable as to form, and at most collateral.

Spirn * claims that limitation of cross-examination of Kosenkov by Judge Tyler was an abuse of discretion and a denial of his Sixth Amendment right of confrontation. The contention is without merit.

After Kosenkov's direct testimony, Rein fully cross-examined Kosenkov about the circumstances surrounding the assault and his later identifications. Spirn's cross-examination then began as follows (54-56):

Cross-examination by Mr. Persky:

Q. Mr. Kosenkov, are you a Communist?

Mr. Rakoff: Objection.
The Court: Sustained.

Q. Are you a representative of the Soviet Union?

Mr. Rakoff: Asked and answered.
The Court: Yes, I agree.

Q. Do you know what the meaning of truth is?

Mr. Rakoff: Objection.
The Court: Sustained.
Mr. Persky: May I be heard on that please, your Honor?

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* Rein and Spirn did not conduct a joint defense at trial. Spirn addressed the question of joint defense only with respect to *objections*, and the Court stated it would accept one objection as covering both defendants (26). Rein cross-examined Kosenkov first and asked him no questions of the type excluded on cross-examination by Spirn (39-53). As there was no limitation on cross-examination by Rein, he has no standing to raise this issue.

The Court: No need to be heard. You were eloquent in the asking, but I don't agree. Go ahead to your next question.

Q. Isn't it a fact that it is part of Communist doctrine——

Mr. Rakoff: Objection.
Mr. Persky: I didn't——
The Court: Finish your question.

Q. Isn't it a fact that it is part of Communist doctrine to tell a lie and to be permitted to tell a lie and represent it as the truth if it is in furtherance of an end that is part of the philosophy of the Communist government?

Mr. Rakoff: Objection.
The Court: Sustained.
Mr. Persky: Excuse me a moment, your Honor.

(Pause.)

Q. What type of work do you do at the Russian Mission?

Mr. Rakoff: Asked and answered.
The Court: You mean in detail, Mr. Persky, or just you want to ask again the title which he has already given?
Mr. Persky: I am asking him what his performance of duties are at the Soviet Mission to the United States.
The Court: Well, I don't think that you understood me. I will allow that, even though I regard it as repetition.

A. I am secretary of the second rank of the Mission.

Q. What type of work does that entail? A. I'm working as a diplomat.

Q. And is part of that status as a diplomat, are

you informed as to the relationship between United States government and your government?

Mr. Rakoff: Objection.
The Court: Sustained.

Q. Are you involved in the suppression of the rights of the Soviet Jews in the U.S.S.R.?

Mr. Rakoff: Objection.
The Court: Sustained.

Q. Is part of your duties concerned with exit visas to those who desire to leave the Soviet Union and reside in the State of Israel?

Mr. Rakoff: Objection.
The Court: Sustained.

Q. Is it part of the policy of your government to destroy the Jewish State of Israel?

Mr. Rakoff: Objection.
The Court: Sustained.

Mr. Persky, so I make myself unmistakably clear, there will be no questioning of this kind permitted at all. Aside and apart from the question of waiver of diplomatic immunity, these matters are totally irrelevant in the context of this comparatively simple proceeding. Thus, your record is unequivocally clear and I don't think you need waste your time and anybody else's in going into these totally irrelevant matters.

While Spirn correctly repeats settled principles that a defendant is entitled to substantial latitude in cross-examining the witnesses against him, including the issue of of bias, it is equally true that "[i]t is a basic principle that a trial judge has extensive discretion in controlling the scope and length of cross-examination [citations omitted]." *United States* v. *Kahn,* 472 F.2d 272, 281 (2d Cir.),

cert. denied, 411 U.S. 982 (1973). *United States* v. *Jenkins,* Dkt. No. 74-2257 (2d Cir., February 10, 1975); *United States* v. *Sperling,* Dkt. No. 73-2367 (2d Cir., October 10, 1974) slip op. at 5647. This principle applies to the eliciting on cross-examination of evidence tending to show bias. *United States* v. *Blackwood,* 456 F.2d 526, 530-531 (2d Cir.), *cert. denied,* 409 U.S. 863 (1972). It is also settled that the trial court may exclude questions ". . . which go beyond the proper bounds of cross-examination merely to harass, annoy or humiliate the witness." *Alford* v. *United States,* 287 U.S. 687, 694 (1931). See also *United States* v. *Persico,* 425 F.2d 1375, 1383-1384 (2d Cir. 1970); *United States* v. *Marti,* 421 F.2d 1263, 1265-1266 (2d Cir. 1970). III Wigmore, Evidence § 781 (Chadbourn rev. 1970).* The line of questioning here fell within the proscribed category.

Moreover, the purpose of the excluded line of questioning—now apparently claimed to have been for "delving into the possible existence of prosecution [sic] witness' motive to testify falsely" (Brief at 10)—was not stated below. To the contrary, remarks of Spirn's counsel later in the trial suggest what he may have been driving at then:

> "This case is a case of first impression. It is a case where there is no secret that the Nixon and Kissinger administration is attempting, to the best of their ability, to create a detente with the Soviet Union, where the immigration of Soviet Jews is concerned, we believe directly as a result of this detente, that this matter be looked into.
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> * * * * *
>
> Your Honor, perhaps not by election or by choice, but by selection you have found yourself in a trial of

* While not directly in point, we submit that the distinction taken in *In re Dellinger,* 370 F. Supp. 1304, 1319 (N.D. Ill. 1973) (Gignoux, *J.*), *aff'd,* 502 F.2d 813 (7th Cir. 1974), between proper argument and "'. . . [an] attack . . . which could only have served to vent [counsel's] spleen'" is not without relevance in judging the propriety of the cross-examination of a witness.

first impression which has significant political overtones.

We find ourselves in a period in history wherein the administration, the Governmental administration of President Nixon, is attempting to create a detente with a totalitarian regime" (162, 165).

A similar theme is taken up in Spirn's brief (at 12):

"Certainly, in the case *sub judice* the credibility of the government witness was highly suspect. Not only is the witness a communist, a member of an organization dedicated to totalitarian principles totally inapposite to ours, but in addition he is a diplomat in the service of a foreign communist state whose avowed aim is said to be the overthrow of the free world. The fact that he is an agent in the service of a hostile political-social-economic movement, whose guiding philosophy is 'the ends justify the means' is a matter of the utmost consideration."

If this was the basis of the excluded line of questioning, it is clear beyond any doubt that Judge Tyler was within his discretion in refusing to permit the questions. Judge Tyler was fully justified in declining to open up a simple assault case into a trial of the purposes of Soviet Communism or of a detente between Russia and the United States for whatever light that might have shed on potential bias on the part of Kosenkov. See *United States* v. *Bowe,* 360 F.2d 1, 15-16 (2d Cir.), *cert. denied,* 385 U.S. 961 (1966).

Moreover, to the extent that the questions were related to purported anti-semitism by the Soviet government, as they seem to have been, they were wholly without foundation to prove bias by Kosenkov against these defendants. There is no showing in the trial record that the defendants were Jews or in any way involved in opposing the alleged Soviet policy against Jews that was implied by the cross-examiner's questions. But the important point is that,

even though the defendants apparently are Jews and members of a group engaged in violent opposition to the Soviet government in connection with its purported mistreatment of Russian Jews, for those facts to have any relevance to a showing of bias by Kosenkov against them, it was necessary to establish at the very least as a preliminary matter that Kosenkov knew one or both of these facts. However, not only was this showing not made, no attempt was made to impeach Kosenkov's unrefuted testimony that he did not even know the defendants' names (38).

Similar considerations further support the exclusion of this line of testimony. Whether or not Kosenkov knew that the defendants were Jews or opposed to the Russian Government, the questions asked were not directed to any personal bias he might or might not have entertained against the defendants for these reasons. Rather, Spirn sought to elicit testimony about purported policies of the Soviet Government generally "to destroy the Jewish State of Israel" without attempting to lay any foundation that Kosenkov was in any way involved in the planning or execution of any Soviet policy involving Israel. *Compare United States* v. *Rosenberg,* 195 F.2d 583, 595-596 (2d Cir.), *cert. denied,* 344 U.S. 832 (1952); *Cf. Williams* v. *Trans World Airlines,* Dkt. No. 74-1469 (2d Cir., January 10, 1975), slip op. at 1271-1272. The questions about the acceptability of perjury in Communist dogma suffered from a similar vice. Moreover, to the extent that Spirn's questions focused on Kosenkov's activities, they were quite plainly improper either because they were similarly irrelevant * or because they were argumentative in form and

* The one question to which an affirmative answer might have had some relevance—whether Kosenkov was involved with exit visas for those seeking to emigrate from Russia to Israel—is not shown to have had any factual basis, *cf. United States* v. *Pacelli,* 491 F.2d 1108, 1120 (2d Cir. 1974), and, given Kosenkov's

[Footnote continued on following page]

assumed facts about Soviet policies in no way established. III Wigmore, Evidence § 780, at p. 173 (Chadbourn rev. 1970); *Skogen* v. *Dow Chemical Company*, 375 F.2d 692, 704 (8th Cir. 1967).

Finally, although the Court need not reach this question, we submit, despite *United States* v. *Fitzpatrick*, 437 F.2d 19 (2d Cir. 1970), on which Spirn relies, that where questions of this sort are asked at a bench trial, the Court, which sits also as trier of fact, should enjoy greater latitude in controlling the cross-examination. At a bench trial the Court is able to determine not only relevance as a legal matter for purposes of admissibility, but also relevance as a subjective matter to the issues of fact which, as the finder of fact, the judge must resolve. Clearly, the added discretion which we suggest cannot, as *Fitzpatrick* holds, preclude impeachment of testimonial assertions conclusive of a defendant's culpability. But when the exploration of the cross-examiner is of some remote area unrelated to the facts of the crime and of the most tenuous connection to the credibility of a witness, we respectfully submit that a trial judge sitting without a jury should have a broader discretion to preclude such an inquiry if he finds it irrelevant to the factual determinations he must make, whatever its admissibility might be if the trier of fact were a jury. *Cf. United States* v. *Miller*, 411 F.2d 825, 832 (2d Cir. 1969). While, for the reasons already given, the questions were plainly excludable regardless of the type of trial involved, were this not so their exclusion was clearly reasonable at a bench trial, since Judge Tyler, as he said, found them irrelevant.

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position in the Russian delegation to the United Nations (27), there was no reason to suppose that he was so involved. In any event, given the clearly pernicious thrust of the line of questioning and defense counsel's failure to suggest a proper purpose, the exclusion of this question was not improper, whatever its relevance. *Cf. United States* v. *Marquez*, 462 F.2d 893, 895 (2d Cir. 1972).

POINT III

The claim that Judge Tyler made a prejudicially premature determination of Spirn's guilt is frivolous.

Spirn contends that Judge Tyler found him guilty before his defense was presented. The contention is frivolous.

At the end of the first day of trial, Rein rested without calling witnesses but Spirn, who had made no request that Detective Greenberg remain in the courthouse after concluding his testimony that afternoon, said he was ". . . constrained to recall the officer for purpose of identification" (125). Judge Tyler agreed reluctantly to adjourn to the following day so that Greenberg could be located and recalled (126). Rein's counsel, because of a serious family illness, asked that Rein's case be disposed of then and there, so that he would not have to come back (127). Judge Tyler proceeded to enter his "findings on the case as it affects Mitchell Rein . . ." (128-132). At one place in his findings Judge Tyler said: "I find further that it was done wilfully and knowingly by the two defendants in question" (130). Spirn's counsel was in the courtroom (128, 134) but made no remark about Judge Tyler's statement, the only place in the Court's findings as to Rein in which there was any intimation as to the identity of Kosenkov's other assailant.

From this statement, which clearly was of so little significance that Spirn did not even notice it below, *cf. United States* v. *Rose*, 500 F.2d 12, 17 (2d Cir. 1974), Spirn argues that Judge Tyler prejudged his guilt. This claim is conclusively refuted by the total absence of anything in the record to support it besides the appearance of the words "two defendants" in one place in Judge Tyler's findings. It is also foreclosed by this Court's recent opinion in *United States* v. *Rosa*, 493 F.2d 1191, 1193-1194 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3210 (October 15, 1974).

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

RONALD L. GARNETT,
JOHN D. GORDAN, III,
Assistant United States Attorneys, of Counsel.

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AFFIDAVIT OF MAILING

TATE OF NEW YORK)
) ss.:
OUNTY OF NEW YORK)

Ronald L. Garnett being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 12th day of February, 1975, he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

1) Robert S. Persky, Esq.
40 Journal Square
Jersey City, New Jersey 07306

2) Bertram Zweibon, Esq.
22 East 40th Street
New York, New York 10016

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Ronald L. Garnett

Sworn to before me this

12th day of February 1975

Laurence S. Feld

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